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Supreme Court U.S.
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No. 02-1276

In The
Supreme Court of the United States

ROSALINA DE LA O, ADMINISTRATRIX
FOR THE ESTATE OF JESUS DE LA O,

Petitioner,

v.

THE HOUSING AUTHORITY OF THE
CITY OF EL PASO, TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a civil rights suit for injunctive relief, seeking only nominal damages, survives the death of the plaintiff under the law of Texas.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Housing Authority of the City of El Paso, Texas prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioner's appendices set forth the relevant opinions of the courts below. The citation of the trial court opinion and its subsequent history are *Vasquez v. Housing Authority of the City of El Paso*, 103 F. Supp.2d 297 (W.D. Tex. 2000), *rev'd,* 271 F.3d 198 (5th Cir. 2001), *rehearing en banc granted*, 289 F.3d 350 (5th Cir. 2002), *order denying motion to substitute party and granting motion to dismiss appeal as moot*, No. 00-50702 (5th Cir. September 23, 2002).

STATEMENT OF THE CASE

In addition to petitioner's statement of the proceedings below, respondent would show that the Fifth Circuit, prior to *en banc* oral argument, requested letter briefs regarding the survival of civil rights actions. A copy of this letter is annexed hereto as respondent's appendix. Petitioner's statement of the procedural history of the case is essentially correct. Respondent, however, does not agree with the extraneous characterizations of the Housing Authority's regulations as being "capricious and unreasonable," or with

the factual representations about the de la O estate's debts and assets. Petition for Writ of Certiorari at 3.

REASONS FOR DENYING THE PETITION

I.

The Texas Survival Statute Requires Actual Damage to the Decedent's Property or Person

The survival of actions brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, is determined by the law of the forum state. *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991 (1978). The Texas survival statute generally provides that "[a] cause of action for personal injury to the health, reputation, or person of an injured person" survives the death of that person. Tex. Civ. Prac. & Rem. Code §71.021. The statute, however, is not specifically tailored to cover Section 1983 causes of action. *Upton County v. Brown*, 960 S.W.2d 808, 817 (Tex. App. – El Paso 1997, no pet.), *citing Hamilton v. Rogers*, 573 F.Supp. 452, 453-54 (S.D. Tex. 1983).

Although the statute does not expressly cover civil rights actions, the caselaw indicates that in order for a cause of action to survive the death of the claimant, actual damages must be at stake. The suit brought by Roberto Vasquez and Jesus de la O, while asserting generic damages, did not relate to their "health, reputation or person," but was directed to injunctive relief. Plaintiffs' Complaint, Fifth Circuit Record Excerpts, Tab 27. De la O has never claimed physical or mental injury, other than in a generalized fashion. The petition for writ of certiorari, as with his prior pleadings, is not specific; it speaks of "potential recovery of damages" at 3, "any damages related to his injury

from breach of constitutional rights" at 5, and the statutory recognition of "recovery for personal injuries, pain and suffering, and other damages suffered prior to . . . death" at 6. Injuries to de la O are never described with particularity at any level of his pleadings. De la O sought to enjoin the enforcement of a trespass regulation, not to prove damages.

The types of damages recoverable under the survival statute include physical pain and suffering, medical and funeral expenses, and consciousness of impending death. *Tarrant County Hosp. Dist. v. Jones*, 664 S.W.2d 191 (Tex. App. – Fort Worth 1984, no writ). Claims based purely on mental or emotional injury are not cognizable under the statute. *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 311 (5th Cir. 1997). An action for damages to real or personal property survives the death of the owner. *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963). The damage claims routinely made the subject of survival actions are not part of de la O's suit.

In the context of appeals, it has been held that the Texas appellate rule permitting the continuation of an appeal after the death of a party, former Tex. R. App. P. 9(a) (now Tex. R. App. P. 7.1(a)), requires that the trial court judgment must affect "the parties' property rights, as opposed to purely personal rights." *Olson v. Committee for Lawyer Discipline*, 901 S.W.2d 520, 523 (Tex. App. – El Paso 1995, no writ). Property rights are not involved in de la O's appeal.

The distinction between personal rights and money damages was examined in *Caine v. Hardy*, 943 F.2d 1406, 1410-11 (5th Cir. 1991), where the claim for damages was held to survive the death of plaintiff under the Mississippi survival statute. Survival was permitted, but the holding turned on the existence of a tangible damage claim. The

court viewed plaintiff's First Amendment claim as being analogous to a wrongful discharge action, which carried with it contractual and tort damages. The action, against the backdrop of the Mississippi statute, therefore, survived plaintiff's death. De la O does not have an analogous claim that would support money damages. More than nominal damages must be at issue.

Respondent does not dispute that the Texas survival statute, in certain circumstances, is broad enough to encompass federal civil rights statutes. The case at bar, however, does not involve such a circumstance. In applying the survival statute in the context of constitutional claims Texas cases appear to require meaningful personal injury. *Upton County*, 960 S.W.2d at 811-812, was concerned with wrongful termination and personal injury. Three of the cases relied on by the *Upton County* court, *id.* at 818, were *Clift v. Fincannon*, 657 F. Supp. 1535 (E.D. Tex. 1987), *Delesma v. City of Dallas*, 770 F.2d 1334 (5th Cir. 1985), *Hamilton v. Rogers*, 573 F. Supp. 452 (S.D. Tex. 1983). All dealt with severe personal injury.

Clift, 657 F. Supp. at 1538-39, was concerned with the drowning death of a quadriplegic patient hospitalized in a mental health and mental retardation facility. *Delesma*, 770 F.2d at 1336, involved the shooting of the plaintiff by a security guard at the State Fair of Texas. *Hamilton* dealt with harassment in the work place on the basis of race. The plaintiff alleged mental and emotional distress, which led to high blood pressure and other health problems. He died during the subsequent litigation. The suit dealt directly with personal injury based on discriminatory animus.

In the context of the Texas wrongful death statute, Tex. Civ. Prac. & Rem. Code §71.002, it has expressly held that there can be no recovery of nominal damages. *Forney v. Memorial Hosp.*, 543 S.W.2d 705 (Tex. Civ. App. – Beaumont 1976, writ ref'd n.r.e.), *citing McGown v. Internat'l G. N. R. Co.*, 85 Tex. 289, 20 S.W. 80 (1892).

II.

The Claims of Petitioner Are Moot

The common factual basis in *Clift*, *Delesma*, and *Hamilton* is that there was clear injury, under the survival statute, to the "health, reputation or person" of the respective decedents. Injury must be claimed and ultimately proven under the statute. The Fifth Circuit, accordingly, has not engaged in a "drastic departure"[1] from the law of the forum state. Petition for Writ of Certiorari at 5. De la O had no such injury, and his claims are moot.

While the Texas Supreme Court has not spoken to the survival of constitutional claims, it has dealt with the

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[1] A portion of petitioner's argument is misplaced in this regard, and deserves comment. Petitioner incorrectly argues that *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002) controls the outcome of de la O's underlying constitutional claim. Petition for Writ of Certiorari at 4-5. Respondent disagrees with this assertion. *Watchtower* did not deal with forum analysis; *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 103 S.Ct. 948 (1983), *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439 (1985), and their progeny continue to be applicable to the use of publicly owned property. While it is difficult to ignore this substantive issue, it is not now before the court. Respondent, however, feels obliged to briefly address petitioner's argument.

mootness doctrine. At least two exceptions have been recognized to the doctrine: (1) the "capable of repetition" exception, and (2) the "collateral consequences" exception. *FDIC v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994); *General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). The first exception is closely allied with still a third exception (as yet unrecognized by the Texas Supreme Court) labeled the "public interest" exception. *Nueces County*, 886 S.W.2d at 767. Common to both the "capable of repetition" exception and the "public interest" exception is the circumstance that there is no effective way to review an issue that most likely will be repeated. *Id.* This normally occurs where "the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App. – Houston [1st Dist.] 1988, no writ). *See also, Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202 (Tex. 1981).

In the case at hand, the sole bar to the appeal is the unfortunate death of Jesus de la O. No short lived ruling nor temporary order is at issue. Should door-to-door solicitations be banned by the Housing Authority in the future, this act could be challenged in a deliberate fashion through normal trial and appeal. Any purported intrusion on constitutional protections would not evade appellate review.

The "public interest exception" was judicially sanctioned at the intermediate appellate level in *University Interscholastic League v. Buchanan*, 848 S.W.2d 298, 304 (Tex. App. – Austin 1993, no writ) a case involving age restrictions in high school athletic competitions. The Texas Supreme Court, however, did not determine whether this was a viable exception, and found it unnecessary to reach

the issue in the later case of *Nueces County*, 886 S.W.2d at 767.

The "collateral consequences" exception is applicable when prejudicial events have occurred and continue "to stigmatize helpless or hated individuals long after the unconstitutional judgment has ceased to operate." *Spring Branch I.S.D.*, 764 S.W.2d at 19. Examples of such stigmas include temporary mental commitments (*State v. Lodge*, 608 S.W.2d 910 (Tex. 1980)) and criminal convictions of juveniles sentenced to compulsory incarceration (*Carrillo v. State*, 480 S.W.2d 612 (Tex. 1972)). Only by an appeal may the individual exonerate himself from the deleterious collateral effects of commitment or incarceration. Because the mootness doctrine would block the efforts to remove the stigmas of mental commitment or juvenile delinquency, an exception was judicially crafted. Even a cursory review of the "collateral consequences" exception establishes that it has nothing to do with de la O's claim.

Moreover, no other exception discussed herein appears to be applicable to the survival of de la O's claims. This leaves the Housing Authority with its initial conclusion intact. The requirement in the survival statute of an injury to the "health, reputation or person" of a claimant, taken together with the strong Texas policy against advisory opinions, *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968), indicates that de la O's cause of action did not survive. The caselaw of Texas, notwithstanding the general language about the survival of civil rights litigation in some cases, supports this conclusion.

III.

The Texas Survival Statute Is Consistent With Federal Protections

If the Texas survival statute does not permit survival of de la O's suit, then the question remains as to whether the statute is inconsistent with the Constitution and laws of the United States. *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924 (1984). In *Robertson v. Wegmann*, 436 U.S. at 594, 98 S.Ct. at 1996, it was held that, "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes [a] plaintiff to lose the litigation." That is all the Texas statute does; it does not have any adverse effect, in and of itself, on the policies underlying Section 1983. *Id.*, 436 U.S. at 594, 98 S.Ct. at 1997. The survival statute is not part of a state law scheme to deny federal rights. There is no claim that "state law is generally inhospitable to the survival of §1983 actions." *Id.* The survival statute is not inconsistent with federal protections, and should be enforced.

CONCLUSION

For the reasons stated herein, this court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August 13, 2002

TO COUNSEL LISTED BELOW

No. 00-50702 – Jesus De La O vs. Housing Authority of the City of El Paso

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Dear Counsel:

The court has requested additional simultaneous letter briefs to be filed on or before August 26, 2002, addressing whether, as a result of the death of Appellant, this action can continue? Restated, can another party be substituted for the Appellant? *See, e.g., Caine v. Hardy*, 943 F.2d 1406, 1410-11 (5th Cir. 1991) (en banc). The briefing should include, but is not limited to:

> (1) what law controls survival *vel non* of this 42 U.S. [sic] § 1983 action; and
>
> (2) whether survival of the action turns on the relief sought/rights at issue (including whether personal or property). *See, e.g., Olson v. Comm'n for Lawyer Discipline*, 901 S.W. 2d 520 (Tex. App. 1995).

Very truly yours,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Geralyn A Maher
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/gam

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